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IN THE HIGH COURT OF DELHI AT NEW DELHI

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WRIT PETITION (CIVIL) NO. 6150/2013

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**Reserved on: 11th December, 2013
Date of Decision: 12th December, 2013**

NOKIA INDIA PRIVATE LIMITED Petitioner
Through Mr. Vikas Srivastava, Mr. J.P. Singh,
Mr. Parag Mohanty & Ms. Leenshwari
Makhijani and Ms. Varsha Bhattacharya,
Advocates.

versus

ADDL. COMMISSIONER OF INOCME TAX & ANR. .. Respondents
Through Mr. Mohan Parasaran, Solicitor General
with Mr. Sanjeev Sabharwal and
Mr. N.P. Sahni, Sr. Standing Counsel
and Mr. Nitin Gulati, Advocate,
Mr.P. Roy Choudhary, Jr. Standing Counsel.

**CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

SANJIV KHANNA, J.

CM No. 15485/2013 (for modification of interim orders dt.26.9.13)

This order disposes of the application filed by Nokia India Pvt. Ltd.
(Nokia India, for short) seeking modification of interim order dated 26th
September, 2013, passed in the aforementioned writ petition.

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2. The writ petition impugns and challenges order dated 25th September, 2013, passed by the Additional Commissioner of Income Tax, Range 13 under Section 281B of the Income Tax Act, 1961 (Act, for short). The impugned order records that in the interest of Revenue, the following assets, properties and bank accounts of Nokia India stand provisionally attached:

“2.6 In view of the above, I am of the considered opinion that for the purpose of

protecting the interests of revenue, it is necessary to attach provisionally u/s 281B of the Income Tax Act, 1961 the following assets/properties/bank accounts of the assessee company, for which prior approval has been accorded by the Commissioner of Income Tax, Delhi-V, New Delhi vide letter F. No. UT/Delhi-V/2013-14/1390 dated 24.09.2013:-

A. All book debts including Trade Receivables, Short Term Loans & Advances and

Long Term Loans & Advances appearing in the books of accounts of the assessee company as on date.

B. Ownership/Leasehold rights in respect of the following immoveable properties

including land and building to the extent of the interest of the assessee company in the property :-

(i) No. A-1, Nokia Telecom SEZ, SIPCOT Industrial Park, Sriperambudur, Chennai, Tamilnadu — 600 001.

(ii) No.4, Nokia Telecom SEZ, Phase-3, National Highway No. 4, Sriperambudur, Chennai, Tamilnadu 600 001.

(iii) 392/1, Green Gardens, Anna Nagar East, Chennai, Tamilnadu — 600 001.



- (iv) No. 2-A, Jupiter Block, 3rd Floor, Prestige Tech Park, Marathalli, RNG Road, Bangalore, Karnataka — 560 001.
- (v) 1st & 2nd Floor, Tower A, SP Infocity, Industrial Plot No. 243, Udyog Vihar, Phase 1, Dundaheera, Gurgaon — 122 016.
- (vi) 5F, Tower A&B, Cybergreens, DLF Cybercity, Sector 25-A, Gurgaon.
- (vii) 2nd Floor, A Wing, Commercial Plaza, Radisson Complex, Mahipalpur, New Delhi.
- (viii) Flat No. 1204, 12th Floor, Kailash Buiding, Kasturba Gandhi Marg, New Delhi — 110 001.
- (ix) Unit No. 123, Building No. 2, Millenium Biz Park, Sector-1, Mahape, Navi Mumbai, Maharashtra 400 612.
- (x) Any other immoveable asset in the nature of land and building owned/leased by the assessee company other than those mentioned above.

C. Plant & Machinery located at any of the properties mentioned at B. above.”

The attachment is effective from 25th September, 2013 till 24th March, 2014. Contents of this order will be referred to subsequently.

3. Nokia India, a subsidiary of Nokia Corporation, Finland (Nokia Finland, for short), was incorporated on 23rd April, 1995. Nokia India was/is primarily engaged in manufacture and sale of mobile devices/phones. It has a factory in Chennai employing about 8000 persons. During the period 2005-06 to 2011-12, it had cumulative turnover/sales of Rs.150700.44 crores.

4. Income earned by Nokia India being a resident in India, is taxed in India. Nokia Finland, being a resident of Finland is primarily taxed in Finland. Nokia India has paid about Rs. 2181 crores as corporate tax during the Assessment years 2001-02 to 2012-13.

5. On 8th January, 2013, survey under Section 133A of the Act was conducted at Chennai and report of Director General of Income Tax (Investigation), Chennai, the respondents submit, records that significant defaults were noticed. Assessment for assessment years 2006-07 and 2007-08 stands reopened. Proceedings have been initiated by issuing notice under Section 143(2) of the Act for the Assessment years 2009-10 to 2012-13. Impugned order records that action under Section 148 was contemplated for the assessment year 2008-09. On question of estimated tax liabilities and assets of Nokia India, the impugned order u/s 281B of the Act, records:-

“2.2 Estimated position of demands likely to arise in the above-referred proceedings is as follows:

S.No.	Asstt. Year	Estimated Additions to Returned Income	Estimated Demand (in Rs. crores)	Major Issues on which additions are anticipated on account of Survey
1	2006-07	15.15	5.00	Disallowance u/s 40(a)(i) of the Act is anticipated on account of non-deduction of TDS u/s 195 on royalty
2	2007-08	1484.30	499.00	
3	2009-10	2336.51	786.00	
4	2010-11	2770.59	933.00	

5	2011-12	3693.90	1243.00	payments for software licensing representing the payee's income deemed to accrue/ arise in India u/s 9(1)(vi) of the Act, being projected as raw material purchased by the assessee company.
6	2012-13	1577.33	531.00	
		Total Demand	3997.00	

The above mentioned estimated additions do not include additions on the basis of transfer pricing adjustments, adverse findings in respect of which have also been noticed during the course of survey u/s 133A as referred to above. Besides, the quantum of demand will increase further once the interest u/s 234A/B/C of the Income Tax Act and penalty as applicable is also levied in the case of the assessee company.

2.3 Position of assets of the assessee company as on 31.03.2012 is as follows:

S.No.	Asset	Balance/Value (in Rs. crores)
1	Total Fixed Assets	586.30
2	Inventories	928.60
3	Trade Receivables	6592.20
4	Cash and Bank Balances	1642.20
5	Short Term Loans & Advances	102.20
6	Long Term Loans & Advances	580.40
	Total	10431.90

2.4 Balance Sheet of the assessee company as on 31-03-2012 shows reserves amounting to Rs. 6220 crores. The assessee company has distributed Rs. 3500 crores as dividend out of its reserves as well as paid Rs. 595 crores as Dividend Distribution Tax. Thus, the cumulative outgo of Rs. 4095 crores is anticipated to have brought down the balances available with the assessee company in the form of cash and bank reserves as well as trade receivables. At the same time, the assessee company has current liabilities of Rs. 4491.60 crores in the form of trade payables and the other current short term provisions and liabilities. After excluding the figures of cumulative outgo on account of dividend distribution and the current liabilities of the assessee company, the assessee company would be left with assets of nearly Rs. 2000 crores. As the figures mentioned above pertain to the previous financial year, the possibility of the availability of assets being even lower as on 31.03.2013 cannot be ruled out. As against this, the

anticipated demand as mentioned above comes to Rs. 3997 crores apart from an existing demand of Rs. 654.18 crores. Thus, it appears that the assessee company does not have adequate assets to recover the anticipated demand.”

6. The respondents’ claim that they were prompted and compelled to issue provisional attachment order in light of the fact that Nokia India had remitted Rs.3500 crores as dividend to Nokia Finland. This fact came to their notice when Nokia India paid dividend tax of Rs.595 crores on 10th September, 2013, leading to a cumulative outgo of Rs.4095/- crores (the figure is mentioned in paragraph 2.5 of order dated 25th September, 2013). The respondents felt and apprehend that Nokia India did/does not have sufficient assets to meet anticipated tax liabilities on completion of pending assessments.

7. Some more facts are also relevant. After the survey on 8th January, 2013, proceedings under Section 201/201(1A) read with Section 195 of the Act were initiated against Nokia India and within a span of two months on 15th March, 2013, orders were passed in respect of financial years 2006-07 to 2011-12 raising a total demand of Rs.1912 crores. Demands in respect of financial year 2006-07, 2010-11 and 2011-12 were sought to be enforced by curtailing the period of 30 days under Section 156 of the Act, to 5 days. It appears that similar attempt was made in respect of financial year 2009-10. These orders were made subject matter

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of challenge before the High Court in several writ petitions including WP(C) No. 2004/2013. By interim order, dated 22nd March, 2013, relying upon the decision of this court in *Sony India Ltd. vs. Commissioner of Income tax* (2005) 276 ITR 278 (Del.), the respondents were restrained from taking coercive measures, for recovery of demand. The court also recorded statement on behalf of Nokia India, on instructions, that they would refrain from transferring or remitting anything out of India except in the normal course of business till the next date of hearing. These writ petitions were disposed of, vide order dated 17th April, 2013 with the direction that the demands shall be enforced after the normal period of 30 days.

8. Subsequently, another set of writ petitions including WP(C) No. 2402/2013 along with applications for stay for recovery of demands under Section 201/201(1A) were filed. It was directed that till the pending first appeals are heard by the Commissioner (Appeals) under Section 246A(1), no coercive measures would be taken. Commissioner (Appeals) should dispose of the appeals as early as possible and latest by 31st May, 2013.

9. Commissioner (Appeals) has dismissed appeals of the applicant Nokia India by orders dated 31st May, 2013. Appeals preferred by Nokia India are pending adjudication before the Income Tax Appellate Tribunal.

10. On 21st June, 2013, two orders on application for stay of demand were passed by office of Director General of Income Tax (International Taxation) and Deputy Director of Income Tax, International Taxation Circle 2(1), New Delhi. By the first order relating to financial years 2007-08 to 2012-13, it was directed that Nokia India shall pay 35% of the total outstanding demand of Rs.2080 crores i.e. Rs 700 crores in monthly installments of Rs.50 crores each, from June, 2013 till December, 2013 and Rs.100 crores, Rs.120 crores and Rs.130 crores in the months of January, February and March, 2014 respectively. In other words, Rs.700 crores out of the demand will be paid by March, 2014. It is accepted that payments in terms of the said order are being made. There was no stipulation or restriction on repatriation of the reserves to Nokia Finland by way of dividend.

11. In the interim order dated 26th September, 2013, we noticed that the bank accounts of the applicant (15 in number) had been provisionally attached in addition to all book debts including trade receiveables, short term loans and advances, long term loans and advances. Learned

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Counsel for the applicant had pointed out that Nokia India has huge investments in India and total value of fixed assets was Rs.586.30 crores. Thus, attachment had brought to grinding halt banking operations of Nokia India or for that matter paralyzed and crippled the entire business activity. Garnishee notices were issued. Nokia India had submitted that valuation of assets and liabilities in India by the break-up method did not reflect true and correct valuation. Nokia India wanted to continue manufacture, sales and exports from India. In fact about 50% of Nokia hand-sets were manufactured in India and 40%/50% of the production was exported. Nokia India asserted that they had no intention or desire to close their operations in India. Referring to future projected demand under Section 40(a)(i), it was submitted that it would be duplication. Keeping in view and recording the aforesaid facts, the following interim directions were issued:

“ 11. Noticing the fact that the petitioner is an operating and a running company, we pass the following interim order till the next date of hearing:

(1) The petitioner will not surrender the lease hold rights or transfer the ownership rights in respect of any of the immovable asset or transfer the fixed asset to any third person.

(2) The petitioner will be entitled to receive debts created receivables, loans and advances but the amount so

received will be deposited in the bank accounts mention in sub-para D of para 2.6 of the impugned order.

(3) The petitioner will not transfer, sell or alienate movable plant or machinery located in the immovable properties mentioned in Clause B of para 2.6 of the impugned order.

(4) The petitioner will be entitled to operate the bank accounts in normal course of business and will file monthly statement of bank accounts with the assessing officer in hard copy as well as by sending details via e.mail at the address which may be provided by the assessing officer to the petitioner.

(5) The petitioner before repatriating any money abroad will inform the assessing officer atleast two working day in advance. The assessing officer, in case, finds the transfer of money concerning or questionable, he will be at liberty to approach this Court for appropriate orders.

(6) No dividend will be transferred abroad without permission of the Court till the next date of hearing.

12. At the suggestion of the revenue, learned counsel for the petitioner will obtain instructions whether any declaration can be furnished by the foreign principal or a third party to protect the interest of the revenue in case there is any shortfall or failure to pay tax arrears.

13. Without prejudice to the rights and contention of the parties the petitioner will continue to deposit instalments in terms of order dated 21.6.2013. We clarify that the stand of the respondent is that the instalments fixed by the said order have no relation or connection with the impugned order under Section 281B of the Act which has been passed on the basis of future demands which may be created in view of the pending assessments.”

12. As noticed above, by the present application Nokia India seeks modification of the interim directions (1) and (3) inter alia pleading that Nokia Finland, their parent company has received an offer from

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Microsoft Corporation (Microsoft, for short), a company incorporated in United States of America for purchase of substantial portion of devices and services business of Nokia Finland on global basis. Thereupon an agreement was concluded for sale of Nokia Finland's substantial portion of devices and services business at global level to Microsoft International Holdings B.V. (Microsoft International, for short), a subsidiary of Microsoft. Relevant extracts of the agreement have been enclosed with the application and the full agreement was shown to the officers of the respondents. As per the agreement, Microsoft International had an option to either purchase the assets, properties, claims and rights of Nokia India or purchase equity shares of Nokia India held by Nokia Finland. (Equity shareholding of Nokia Finland in Nokia is attached, but the said attachment is not under challenge). It is stated that Microsoft International has decided not to purchase equity shares of Nokia India held by Nokia Finland and has concluded first and second amendment in form of Stock and Asset Purchase Agreement dated 14th November, 2013. It is highlighted that Microsoft International has made it clear that it is only interested in purchasing assets etc. provided approvals are granted by the relevant authorities and they are also aware of the liens etc., on the assets. It has been agreed that in case necessary approvals are not



received, Microsoft International shall not purchase the Indian assets.

Paragraphs 6(f) to (i) of the application, read:-

“f. It has been clearly understood that in case the purchase of Indian assets does not go through, Microsoft International would have to reallocate production volumes of phones to other manufacturing facilities (outside India, to jurisdictions where it would as a consequence of the transaction have its own manufacturing facilities) and this will be achieved within 12 months of the closing of the global deal between Microsoft International and Nokia Corp. In the meantime, if so required by Microsoft International, the Petitioner/Applicant will act as a temporary transitional contract manufacturer of phones for Microsoft International and in no event shall this arrangement continue beyond 12 months from the closing of the global deal between Microsoft International and Nokia Corp, unless Nokia Corp would find another buyer for the factory.

g. If the Relevant Assets are not transferred to Microsoft International, consequence will be a gradual ramp down of the Petitioner/Applicant's device manufacturing business operations leading to a winding up of its business operations within 12 months from the closing of the global deal between Microsoft International and Nokia Corp.

h. Microsoft International and Nokia Corp urgently need clarity on whether or not the Relevant Assets can be transferred to Microsoft International as part of the global transaction, as this will impact a number of operative issues on how the business is run and organized going forward. For this reason, the Amendment specifies a date (namely 12.12.2013) by which the parties must have final resolution on this issue.

i. If the liens placed on the assets of the Petitioner/Applicant have not been released by this date, Microsoft International will not be able to purchase the Relevant Assets of the Petitioner/Applicant, and Nokia Corp will retain the same.”

13. Applicant pleads that technology is the most valuable input in a mobile phone/device. Similar phones are available at a fraction of the price but Nokia phones command premium and goodwill because of superior technology developed and constantly upgraded by Nokia Finland. However, as Nokia Finland, the holding company is exiting the said line of manufacturing and sale of mobile phone globally, the technology will no longer be available. Production and sales in India by Nokia India will stop. Value of the Indian company i.e., Nokia India will decline sharply and tangible assets on sale may only fetch fraction of their value in use. In case Microsoft refuses and does not purchase Indian assets etc., Nokia India will have no option but to wind up manufacturing operations within a period of 12 months. Microsoft International would be at liberty to commence or start production in other countries. Nokia India has 8000 employees, apart from 25000 people who are employed in ancillary supplier units etc. In case assets are taken over by Microsoft International, employees presently working for Nokia India will become employees of Microsoft International or their associates. Land, building, plant and machinery of Nokia India is located on SEZ land, which is incapable of transfer on stand-alone basis. The assets if sold in such circumstances will not fetch substantial value. The

applicant has offered to deposit surplus proceeds realized after adjusting outstanding liabilities and obligations from Microsoft International on sale of assets in India with a minimum deposit of Rs.2250 crores in an escrow account to meet liabilities, if any, of the Income Tax Department. The said deposit will be made within one month of the confirmation of sale. It is stated that the Income Tax Department will have first lien.

14. The respondents have not accepted the suggestion or offer made by Nokia India. They have questioned bonafides of Nokia India and Nokia Finland, alleging that agreement dated 2nd September, 2013 was prior to the interim order passed on 26th September, 2013 but the said details were not brought to notice. Decision of Microsoft, not to purchase equity shares of Nokia Corporation and to rather purchase assets, is a convenient coincidence and an act of internal collusion between the two. Trigger date i.e. 12th December, 2013, it is stated that, is wholly irrelevant and the Revenue cannot be compelled to take a decision in haste without ascertaining complete facts. Furthermore, Nokia India on 26th September, 2013 had stated that the manufacturing operations would continue, asserting that 50% of the hand-sets are manufactured in India and were also exported. They had assured that Nokia India had no intention to close their operations in India. But, now a different and contradictory

stand has been taken. It is alleged that term 'surplus sale proceeds' coined by Nokia India is vague and fanciful and as per the calculations of the respondents the figure of Rs.2250 crores is not a sufficient and legitimate deposit, keeping in mind the existing and anticipated tax demands and hence, the application does not have any merit and should be dismissed. Along with reply, the respondents have also filed annexures R1 to R5 setting out projected tax demands which may be payable by both Nokia India and Nokia Finland with and without penalty and interest. We shall refer to the said calculations subsequently.

15. At the outset, we notice that there are apprehensions and misgivings. The two parties are reluctant to believe and accept the statements made by each other. This has not helped in resolving the matter. The grievance and apprehension of the respondents, it is apparent, is primarily because the applicant had withdrawn from reserves and repatriated Rs.3500 crores as dividend to Nokia Finland. The said grievance of the respondents is not baseless or without foundation, inspite of the contention of the applicant that they had every right to declare dividend from the profits earned and on which full tax had been paid. Applicant has submitted that no dividend had been declared and paid from date of incorporation of Nokia India in 1995 till 2013. Rs.595



crores was paid as dividend tax to the respondents. The apprehension and fear of the applicant is that the respondents have been unfair on two/three occasions when direction was given that the tax demands be paid within 5 days, curtailing 30 days period specified under Section 156 of the Act and such an action necessitated filing of writ petitions and a stay order. The apprehension is also founded on the allegation that the orders under Section 201/201(1A) were passed in great haste and hurry and it is alleged that the demand as computed includes amount of Rs.3100 crores for which there was no credit entry in the books of accounts of Nokia India and no payment was in fact made by Nokia India to Nokia Finland. Reference is made to the order under Section 281B which virtually had the effect of seizure of bank operations, dishonor of cheques etc.

16. At this stage, we only record that prima facie we find that there is partial truth in the allegations made by both sides against each other. In fact, the oral submissions made on behalf of the applicant at the time of initial hearing were to the effect that the offer made by them was final, give it or take it after. It is a favour and if the offer made is rejected, consequences and warnings as stated will follow. The said statements have certainly not helped and are completely unexceptionable. As noticed below, the applicant and Nokia Finland, have benefitted and should not

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be oblivious to the profits made from the India operations. Taxes in India, as per law have to be and must be paid. Every tax payer or person residing in India or doing business with Indian residents must comply with the law, meet their obligation and share their due tax burden. Of course they are entitled to and will be dealt with fairly and in a just manner. In subsequent hearings, the applicant has sought to clarify that the impression given during the earlier hearings was not their intention and both Nokia India and Nokia Finland firmly believe and hope that manufacture of devices and Indian operations should be taken over by Microsoft International.

17. Nokia Finland has substantially benefitted from the sales and manufacturing activities in India. Nokia Finland had made an initial investment of Rs.35.6 crores in Nokia India starting in 1996. Thus, in monetary terms investment by Nokia Finland was not substantial. As per the details filed, total investment in India by Nokia India has increased to Rs 1858.95 crores which includes production, work paid resources and parked assets. These assets have been created from internal accruals i.e. from profit earned from commercial activities, manufactures, sales and exports from India. It is apparent that doing business in India has been extremely profitable and beneficial for Nokia Finland who have received



dividend of Rs.3500 crores in the current financial year. Nokia Finland has also commercially benefited from the purchases made by Nokia India from them and their associated enterprises. Total quantum of purchases including raw material purchases from Nokia Finland and their associated enterprises is about Rs.57924.48 crores. This includes assembly to order and raw material but does not include labour or depreciation. In comparison Nokia Finland had paid paltry income tax of about Rs 71 crores for the period between 1997-98 to 2007-08. After 2008-09, no tax has been paid in India by Nokia Finland.

18. At the same time, Nokia India has paid corporate tax of Rs.2181 crores for the Assessment Years 2002-03 to 2013-14. They have also paid dividend distribution tax of Rs.595 crores. Nokia India directly employs 8000 employees and indirectly employs about 25000 persons in India. The total production or sales by Nokia India between 2006-07 to 2012-13 was Rs.150700.44 crores and the total purchases from third parties i.e., parties other than Nokia Finland and associated enterprises during this period i.e. Assessment Years 2006-07 to 2012-13 was Rs.74,447 crores. Nearly 40 to 50% of the hand devices/mobile phones manufactured by Nokia India were/are exported worldwide. Figures with regard to indirect taxes in form of excise duty, customs duty, service tax

or value added tax paid by Nokia India are not available but the said taxes paid would be substantial and significantly more than the corporate tax paid.

19. Quantum of tax demand or the project demand before us has been contested. Respondents during the course of hearing before us had filed the following chart:

(1) Intl Tax	Tax (A)	Interest (B)	C=A + B	Penalty (D)	Total (C+D)
(i) NIPL (201 + 201A)	1912	737	2649	1912	4561
(ii) Nokia Corp	1912	1330	3242	1912	5154
(2) CIT-V					
(iii) NIPL [40(a)(i)]	4292*	2000	6292	4292	10584
Total (i)+(ii)+(iii)			12183	8116	20299
CIT-V					
(iv) NIPL [40(a)(i)]	2274**	995	3269	2274	5543
Total (i)+(ii)+(iii)			9160	6098	15258

[ALL FIGURES IN Rs.CRORE], *without S.10AA deduction, **with S10AA deduction.”

20. The aforesaid figures, it is submitted on behalf of the applicant are highly debatable, overlapping and inflated to cause prejudice. The figures do overstate the projected tax demand to some extent. Besides the respondents presume and assume that they shall succeed on all accounts, fair and square. The respondents have taken the figure of Rs.1912 crores twice, as payable by Nokia India as tax at source whereas if this payment is made by Nokia India, Nokia Finland would not be liable to pay the

same as tax. Similarly, as noticed above, the applicant has contended that the total payments made by Nokia India to Nokia Finland for software has been wrongly enhanced by Rs.3100 crores. This submission gets support from the details of remittances filed by the respondents before us. As per the said details Nokia India during the period 1st April, 2006 to 31st March, 2012 has paid Rs.15046 crores to Nokia Finland. If this figure is taken as correct, then the TDS or tax, if payable, by Nokia India/Nokia Finland would be about Rs.1600 crores. However, this is only a prima facie view and not a conclusive firm opinion.

21. In the aforesaid computation, the Revenue has computed addition which may be made in the assessment/reassessment proceedings of Nokia India by the Assessing Officer by invoking Section 40(a)(i) of the Act. The said provision stipulates that if an assessee fails to deduct tax at source on royalty etc. payable to a person resident outside India or fails to deposit tax, the amount paid as royalty etc., will not be allowed as an expenditure while computing income chargeable as 'profits and gains from business or profession'. The said expenditure will be allowed as a deduction in computing income of the previous year in which the said tax is paid. In nutshell, the effect of the said provision is that Rs.15046 crores paid by Nokia India to Nokia Finland during the period 2006-07 to

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2011-12 would be disallowed as expenditure in the hands of Nokia India, inspite of the fact that payment was made. This is because Nokia India had failed and did not deduct tax at source of Rs.1600/1912 crores. Rs.15046 crores would be allowed as expenditure in the profit and loss account in the year in which tax at source of Rs.1600/1912 crores is paid. This is the legal consequence of Section 40(a)(i). However, first the question and the hurdle which the respondents must meet and cross is whether the amount paid was royalty as submitted and was not business income.

22. As per the computation made by the respondents, addition under Section 40(a)(i) would result in a tax demand of Rs.4292 crores against Nokia India and interest of Rs.2000 crores on the said demand. Further if, penalty for concealment under Section 271(1)(c) @100% of the tax is imposed, Nokia India would be liable to pay another Rs.4292 crores. Thus making a cumulative total demand of Rs.10584 crores for addition under Section 40(a)(i) of the Act. Another penalty of Rs.1600/1912 crores can be imposed as per the respondents under Section 271C of the Act for failure to deduct TDS.

23. As per the computation filed by the respondents, the Nokia India would be liable to pay interest as noticed above of Rs.2000 crores on tax

demand of Rs.4292 crores and Rs.737 crores on late deposit of TDS. Nokia Finland may not be liable to pay tax, if TDS is paid by Nokia India, but they would still be liable to pay interest as per calculations made by the respondents of Rs.1313 crores and also penalty under Section 271(1)(c) of the Act of Rs.1912 crores (amount may be less in case the tax payable is Rs.1600 crores and not Rs. 1912 crores).

24. The cascading effect of the issue and impact of Section 40(a)(i) of the Act is apparent. It is a stringent and burdensome provision. However, in case contention of the respondents is rejected, and the stand of the applicant, that the payment made was not royalty is accepted, the entire calculation would be futile and no amount would be payable.

25. In the aforesaid chart, the respondents have also computed figure of the tax payable by Nokia India after computing tax under Section 10AA. The figure given is Rs.2274 crores. After including interest and penalty computed under Section 271(1)(c) of the Act, the figure comes to Rs.5543 crores. In the assessment already made, benefit of the said Section has not been denied to Nokia India. The computation made by the respondents itself indicates that substantial production undertaken by Nokia India, is exported. It is accepted that Nokia India has paid Rs.350 crores in terms of order dated 21st June, 2013 and have to make balance

payment of Rs.350 crores as per the installments agreed on or before March, 2014.

26. It is clear from the aforesaid table and computation made by the respondents that the entire case is based upon their plea and contention that payments made for software by Nokia India to Nokia Finland of Rs.15046 crores was taxable in the country at source i.e. India, as it was royalty for right to use copy right. The stand of the applicant is that this payment was not royalty for right to use the copyright under the Double Taxation Avoidance Agreement between India and Finland. We only note that the issue or the contentions raised by both sides are debatable and arguable. It would not be fair or proper to give even a tentative opinion without exhaustive hearings as it might prejudice a party. The issue however is not new but appears to be recurrent. Order under Section 201/201(A) refers to decisions on this point including decision of Delhi High Court in the case of Nokia itself but the adjudicating officer has not been accepted and applied the ratio. The order refers to explanations incorporated to Section 9(1)(vi) of the Act by Finance Act, 2012 with retrospective effect from 1st June, 1976/1st April, 2001. The order also states that the said explanations or definitions can be applied to construe provisions/articles of Double Taxation Avoidance Agreement.



Question of limitation etc. have also been raised. Another issue which arises for consideration is whether penalties can be and should be imposed under Section 271C or 271(1)(c) of the Act as the defence/plea of the applicant/Nokia Finland is legally plausible and relates to interpretation of law. These contentions and issues will have to be adjudicated and decided in the assessment, penalty and the appellate proceedings. Assessee's appeals in respect of orders passed under Section 201/201(1A) are pending before the tribunal and the decision on the said aspect will have a relevant and vital bearing on the assessment/re-assessment proceedings against Nokia India and Nokia Finland. But the aggrieved party is likely to file appeals before the High Court and then the Supreme Court. We have referred to the orders and issues raised to highlight and point the controversy and that the questions and issues are debatable and will require indepth adjudication. We also do not wish to express any opinion on merits as this can prejudice to a party.

27. Section 281B of the Act is a provision which permits provisional attachment in respect of property belonging to the assessee during pendency of the proceedings for assessment or reassessment when the Assessing Officer is of the opinion that it is necessary to do so to protect the interest of the Revenue. He requires permission/previous approval of

Commissioner/Chief Commissioner etc. The provisional attachment is effective for a period of six months. But Commissioner or Chief Commissioner or Director for reasons to be recorded in writing can extend the aforesaid period provided the total period of extension should not exceed 2 years. The provision is primarily to protect interest of the Revenue but has to be exercised with care and caution.

28. We have quoted relevant portion of the interim order dated 26th September, 2013. In paragraph 12 thereof, we had mentioned that the counsel for the petitioner i.e. the applicant, would obtain instructions whether any declaration could be furnished by the foreign principal or third parties to protect the interest of the Revenue in case there is any shortfall or failure to pay tax arrears. During the course of hearing before us, learned counsel appearing for the applicant was asked to obtain instructions whether Nokia Finland is ready and willing to furnish any letter of guarantee to the respondents, which would be also treated as an undertaking given to the court, in addition to ensuring the minimum deposit of Rs.2250 crores. Learned counsel has informed us that Nokia Finland is ready and willing to give letter of guarantee and has furnished a draft of the same, which reads:

"We, M/s Nokia Corporation, a company incorporated under the laws of Finland and currently having our offices at Keilalahdentie 2-4, 02150 Espoo, Finland, state and affirm as follows:

1. We understand that the Indian Income Tax authorities have initiated proceedings under Section 201 of the Indian Income Tax Act, 1961, against M/s Nokia India Private Limited ("NIPL"), a company incorporated under the laws of India and having its current offices at SP Infocity, Industrial Plot No. 243, Udyog Vihar, Phase 1, Dundaheera, Gurgaon, Haryana – 122016 India, on the ground the NIPL was liable for withholding tax at source from the payments made to Nokia Corporation during the financial years 2006-07 to 2011-12 for purchase of copies of software.
2. We understand that the Indian Income Tax authorities contend that the said payments constitute royalty under the provisions of the domestic income tax laws of India and the Double Taxation Avoidance Agreement entered into between India and Finland ("Indo-Finland DTAA").
3. We also understand that aforesaid proceedings are currently pending in appeal before the Income Tax Appellate Tribunal, Delhi.
4. Nokia has always recognized that its own long-term interests and those of its various stakeholders depend on strict adherence to applicable regulation, the Rule of Law and on following the highest standards of ethics. As a responsible corporate citizen committed to paying taxes in accordance with applicable national and international laws and treaties, we are obliged to pay the income tax liabilities which may ultimately be found to be payable by us pursuant to the aforesaid proceedings after exhausting all legal remedies available to us and without prejudice to our rights under the Indo-Finland DTAA (and more specifically Article 26 of the said DTAA) and any other applicable treaty or agreement.
5. Signed in Espoo, Finland on 11th December, 2013



NOKIA CORPORATION”

29. During the course of hearing, learned counsel for the applicant accepted and agreed that Nokia Finland shall make payment of tax, interest and penalty if due and payable as determined under Section 201/201(1A) and the relevant provisions; the tax liability interest and penalty of Nokia Finland, if determined, due and payable. They have expressed their inability to furnish any such letter of guarantee in respect of tax demand which may become due and payable by Nokia India pursuant to any assessment or reassessment on account of invocation of Section 40(a)(i) of the Act.

30. At this stage, it would be relevant to refer to Article 26 of the Double Taxation Avoidance Agreement between India and Finland which postulates assistance in collection of taxes due and payable by a State from a resident of another contracting State. The respondents have submitted that there may be resistance and obstruction in collection of the taxes, even if the demand is confirmed and has attained finality.

31. Section 170(3) of the Act relates and deals with succession. The said provision being statutory will provide some and limited protection to

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the Revenue if the assets are purchased by Microsoft International from Nokia India. However, we are told that the protection under the said Section will not be effective and will not cover substantial period and the amount relatable to the period specified is insignificant.

32. We had asked learned Solicitor General whether the respondents have valued the assets of the applicant Nokia India. The respondents were also asked whether they have any alternative plan(s) and what they intend to do in case Nokia India stops manufacturing or decides to close down their operations. It was stated that the assets of Nokia India will be sold but on the question of market value of the assets, the respondents were silent. It was stated that no such study or examination has been made. They have not ascertained and visualized the consequences, and how and in what manner interest of the income tax department is advantageously protected.

33. As per the order dated 25th September, 2013 under Section 281B, the total assets of the applicant were valued at Rs 10431.90 crores but the applicant had liabilities of Rs 4491.60 crores in form of trade payables and other short term provisions. The applicant had reserve of Rs.6220 crores from which cumulative outgo of Rs.4095 crores on account of dividend of Rs.3500 crores and dividend tax of Rs.595 crores stands paid.

Law

In the said order, the tentative/anticipated demand has been computed at Rs.3997 crores apart from existing demand of Rs.654.18 crores, which is significantly less and different from demand now highlighted to us in the chart. We have already commented on the said calculations. It is stated that in the order under Section 281B after meeting the current liabilities, the applicant will be left with assets of Rs.2000 crores. It is accepted that net current assets of the applicant are Rs.2347 crores and the value of the fixed assets is Rs.586.30 crores (The applicant had protested against the valuation made by the respondents during the course of hearing on 26th September, 2013 and submitted that the break-up method was not correct and was not reflective of true and correct position. Respondents had pleaded to the contrary. However, now their stands are reverse.)

34. Nokia India, in the manufacturing unit, have directly employed 8000 workers and they indirectly, it is claimed, are providing employment to another 25000 persons. Their employment is at stake and this fact cannot be ignored. Neither can we ignore the fact that Nokia India had repatriated Rs.3,500 crores, though they were aware that there was a dispute and would be claims of the Income Tax Department. As of now, the tax demand or issues are inchoate and it may take a considerable time before the issue is finally settled. Possibly, the dispute will be taken



to the Supreme Court for final adjudication and this is a time consuming process. The final outcome is uncertain and not free from doubt. Even if the matter is decided against Nokia India/Nokia Finland, the quantum of demand itself in respect of deduction under Section 40(a)(i), interest and penalty including penalty under Section 271C/271(1)(c) of the Act would depend upon several factors. These may take their own time to decide.

35. Closing down or keeping out Nokia India, when Nokia Finland is globally transferring and disposing of their hand devices/mobile phones business, may not be the sound and considered decision or even in the interest of the Revenue as there could be sharp decline in the market value of the assets of Nokia India. There would be a few purchasers and invariably in such sales, proceeds are frugal. The respondents themselves are not sure of the market value of the assets and have not undertaken any calculation or examined what will be the consequences in case Microsoft International does not take over the Indian assets.

36. Nokia Finland or their affiliates have business all over the world and there are involved in tax issues or litigations in other countries. Tax proceedings in India have taken a centre stage. The respondents have relied upon and referred to the settlement or understanding between



Nokia Finland or their affiliates with the tax authorities in Brazil. The applicant, on the other hand, had stated that the figures and details pointed out by the respondents in their note/chart are incorrect. There is tax litigation or disputes in Brazil, but Nokia Finland/their affiliates have furnished bank guarantee from a local bank to the extent of 5% of the total tax, which is subject matter of dispute. The amount paid is equal to Rs.320 crores.

37. Nokia Finland, it is stated, will receive about Rs.31,000 crores pursuant to the global transfer of hand devices/mobile phones from the Microsoft International. Nokia Finland, it is stated, will continue to exist and operate, even after handset/mobile phone business is sold to Microsoft International. Nokia Finland is a listed company having several businesses and business interests. Nokia Finland, it was averred but not disputed, has substantial assets and reserves.

38. In view of the aforesaid position, we are inclined to modify our interim order dated 26th September, 2013, in particular clause (1) and (3) thereof. We permit and allow sale of assets by Nokia India to Microsoft/Microsoft International subject to fulfilment of the following conditions:-



- (i) Nokia Finland will be bound by the statement that they shall be jointly liable and shall pay tax demand determined and payable under Section 201/201(1A), interest and penalty thereon.
- (ii) Nokia Finland shall be liable to pay taxes including penalty and interest due and payable by them as determined under the Act i.e. the Income Tax Act, 1961.
- (iii) Nokia India/Nokia Finland will deposit atleast Rs.2250 crores in an escrow account, details of which will be furnished to the respondents with one month of the agreement with Microsoft/Microsoft International. The amount of deposit will go up or increase upon higher consideration being received from Microsoft/Microsoft International, as per valuation report.
- (iv) Copy of the valuation report will be furnished to the respondents within 15 days of acceptance.
- (v) Rs.2250 crores or the higher amount, which will be deposited in the escrow account, at the option of the respondents may not be adjusted or appropriated against tax demands including interest and penalty relating to TDS/order under Section 201/201(1A) or tax demands determined and payable by Nokia Finland. Respondents can insist that the escrow account shall be first adjusted or appropriated towards demand

pursuant to assessments under Section 143(3)/147 of the Act against Nokia India.

(vi) In case of an adverse assessment or re-assessment order or tax demand being created against Nokia India under Section 143(3)/147 of the Act, the demand will be paid from the escrow account subject to stay order, if any, against recovery of the said demand from appellate authority or Indian courts and in case Nokia India pays any amount, or is appropriated from the escrow account, and Nokia India subsequently succeeds, the amount will be refunded with interest in accordance with the provisions of the Act. Interest earned on the escrow account will be also included in the amount payable.

(vii) Income Tax Department without prejudice to their rights and without affecting the obligation of Nokia, Finland mentioned in clauses (i) and (ii) above, can in the case of non-payment, seek payment/appropriation of Rs.2250 crores or the higher amount in the escrow account including interest towards dues under Section 201/201(1A), penalty and interest. The said appropriation or payment would not affect the obligation of Nokia, Finland.

(viii) Nokia Finland, in addition to the undertaking or letter of guarantee quoted above, will file another letter in form of guarantee/undertaking

incorporating the terms and conditions mentioned herein and file the said letter/undertaking with the income tax authorities i.e. Deputy Director of Income Tax (International Taxation) and Commissioner of Income, Delhi-V and in this writ petition. This will be treated as undertaking to the Court. The letter/undertaking will clearly state that Nokia Finland will abide by clauses (i) and (ii) above and will cooperate in payment of tax dues payable under Section 201/201(1A) or the dues payable by Nokia Finland. Copy of the letters/undertaking will be filed by Nokia Finland with their Government.

(ix) Nokia Finland will not be liable to pay the tax dues of Nokia India, except to the extent permissible and recoverable under the provisions of the Act i.e. the Income Tax Act, 1961. However, in case the total amount due and payable by Nokia Finland in clause (i) is less than Rs.3,500 crores, and Nokia India is unable to pay dues under clause (vi), Nokia Finland will be liable to pay tax dues of Nokia India upto but not exceeding Rs 3500 crores. In other words, Nokia Finland will not be liable to pay tax dues under clause (i), and the present clause exceeding the figure of Rs.3,500 crores. This amount has been fixed as dividend of Rs.3,500 crores stands paid by Nokia India to Nokia Finland. Demand under clause (ii) stands excluded as the said liability is personal to Nokia

Finland. This limit of Rs.3500 crores does not apply to demand under clause (i).

(x) Microsoft/Microsoft International will not be liable to pay tax dues of Nokia India and Nokia Finland, except when any amount due and payable as per the provisions of the Act.

(xi) In case of non-compliance of clauses (i) and (ii) above or non-payment of the settled demand in terms of clause (ix), Revenue can approach the Court for appropriate orders. In such circumstances, the Court will have the power to take action or directions as may be justified and appropriate steps to ensure compliance.

(xii) Nokia India/Nokia Finland will continue and pay Rs.700 crores in installments in terms of the order dated 21st June, 2013 and this amount has no co-relation with Rs.2250 crores or higher amount, which will be deposited in the escrow account.

(xiii) Nokia India/ Nokia Finland will be entitled to contest the income tax proceedings and demands under clauses (i) and (ii) against Nokia India/Nokia Finland which can be enforced by the respondents in accordance with law, subject to right of Nokia India/Nokia Finland to plead and ask for stay. In absence of stay, demands will be recoverable.

(xiv) It is open to the parties to take recourse to mutual agreement

procedure or mutually modify the terms and conditions of this order and approach the Court in case modification or if any clarification is required.

(xv) Attachment of shares of Nokia India held by Nokia Finland is not subject matter of this order.

(xvi) Other stipulations and directions in the interim order dated 26th September, 2013 will continue.

39. The application is accordingly disposed of with no order as to costs.

W.P.(C) 6150/2013

List on 3rd January, 2014, the date already fixed.

Sd-

**(SANJIV KHANNA)
JUDGE**

Sd-

**(SANJEEV SACHDEVA)
JUDGE**

December 12th, 2013

kkb/NA

Attchd n
Sanjiv 12/12/13

**Court Master
High Court of Delhi
New Delhi**